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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.H., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. W.F., Defendant and Appellant.	D077519 (Super. Ct. No. J520237)

APPEAL from orders of the Superior Court of San Diego County, Marian F. Gaston, Judge. Affirmed in part and reversed in part.

Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Jesica N. Fellman, Deputy County Counsel, for Plaintiff and Respondent.

W.F. (Mother) appeals from jurisdiction and disposition orders of the juvenile court declaring her son, J.H., a dependent of the court pursuant to

Welfare and Institutions Code[1] section 300, subdivision (b)(1), and removing him from Mother's care. She contends that the evidence did not support the juvenile court's findings regarding jurisdiction. We conclude that substantial evidence, including Mother's drug use history and J.H.'s birth with drugs in his system, supported the juvenile court's jurisdictional order.

Mother also challenges the dispositional order removing J.H. from her custody. Because the juvenile court failed to articulate whether there were alternative means to protect J.H., other than removing him from Mother's custody, we reverse the custody dispositional order and remand the case to the juvenile court for a new dispositional hearing.

FACTUAL AND PROCEDURAL BACKGROUND

Mother's Background

Mother was born in Los Angeles in 1987. She used methamphetamine with a paternal aunt from age 15 through age 18. Mother dropped out of school in the eleventh grade. She then met her husband, H.V. Mother reported that she stopped using methamphetamine at age 18 and remained sober during her 12-year marriage while she unsuccessfully tried to conceive.

In 2016, Mother separated from H.V. without a divorce. She started using methamphetamine again to cope with her loneliness. Mother was arrested in October 2016 for attempting to transport approximately 8.46 kilograms of heroin, 2.18 kilograms of methamphetamine, and 1.26 kilograms of cocaine into the United States. She committed the crime because " 'they were going to pay [her] in drugs' " and claimed it was an "isolated incident." Mother served 32 months in federal prison.

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1 Undesignated statutory references are to the Welfare and Institutions Code.

In December 2018, Mother moved to Mexico after her release from prison. She met J.H.V. at a party and relapsed. She reported using methamphetamine with J.H.V. weekly throughout the first five to six months of her pregnancy. Mother said she did not know about the pregnancy because she had normal periods the entire time and explained that she has " 'always been fat.' " Mother also claimed she and J.H.V. stopped using drugs when she learned about the pregnancy.

Current Dependency Proceedings

Mother delivered J.H. in December 2019. While in the hospital, the attending nurse described Mother as " 'a dream,' " attentive to J.H., and " 'easy to work with.' " However, she and J.H. tested positive for amphetamine, methamphetamine, and fentanyl.[2] Mother denied any drug use in the last two to three months before J.H.'s birth. Mother claimed that she and J.H.V. argued several days before the birth and that she stayed at the home of a friend who used methamphetamine. Mother acknowledged staying with the friend despite the fact that the friend continued to smoke methamphetamine in her presence.

Four days after J.H.'s birth, the San Diego County Health and Human Services Agency (Agency) filed a dependency petition under section 300, subdivision (b)(1), alleging that a substantial risk existed that J.H. will suffer serious physical harm or illness based on Mother's drug use history. Seven days after giving birth, Mother completed an assessment with a substance abuse specialist and scheduled an orientation with South Bay Women's Recovery Center.

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2 Mother received 50 micrograms of fentanyl in the hospital 26 minutes before J.H.'s birth.

Mother and J.H.V. appeared at the detention hearing and were appointed counsel. The juvenile court adopted the Agency's recommendations, ordered a paternity test for J.H.V. as the alleged father, and added H.V. to the petition as an alleged father. The Agency detained J.H. at a licensed resource home. At a January 2020 hearing, Mother requested a contested trial and based on Mother's statement that she had intercourse in March 2019 with a man named Ricardo, the court amended the petition to add Ricardo Doe as an alleged father. J.H.'s caregivers reported that Mother visited twice weekly, brought a diaper bag to the visits, and appeared clean and sober.

In March 2020, the court continued the contested jurisdiction and disposition hearing due to the COVID-19 pandemic and court closures. Mother remained sober and complied with her substance abuse treatment program. Although she was not able to have in-person visits with her son after the COVID-19 stay-at-home order went into effect, Mother had daily video chats with the foster parents and J.H. The COVID-19 restrictions also prevented the evaluation of Mother's home in Tijuana, Mexico.

The contested jurisdictional and dispositional hearing in May 2020 proceeded as a trial on the documents.[3] Based on a negative paternity test result, the court struck J.H.V. from the petition as the alleged father. Mother requested dismissal of the petition or, in the alternative, return of J.H. to her care with family maintenance services. The Agency and J.H.'s attorney requested a true finding on the petition and that the juvenile court adopt the recommendations of the jurisdiction and disposition report.

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[3] A few days before trial, Mother was scheduled to begin two-hour weekly unsupervised visits at the Agency offices, with plans for longer and more frequent visits when COVID-19 restrictions were removed.

The juvenile court found the allegations of the petition true by clear and convincing evidence. It also found by clear and convincing evidence that J.H. should be removed from Mother's care based on her "long history" of methamphetamine abuse, stating "this is going to be a lifetime project for [Mother] to maintain her sobriety. And so it would be premature to order [J.H.'s] placement with her right now."

DISCUSSION

1. *General Legal Principles*

A parent may seek review of both the jurisdictional and dispositional findings on an appeal from the disposition order. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) We review the juvenile court's jurisdictional and dispositional orders for substantial evidence. (*In re I.J.* (2013) 56 Cal.4th 766, 773 (*I.J.*).) The burden of proof for jurisdictional findings is preponderance of the evidence; for removal, it is clear and convincing evidence. (*Cynthia D.*, at p. 248.)

In applying the substantial evidence standard of review, " ' "we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court." ' " (*I.J.*, *supra*, 56 Cal.4th at p. 773.)

2. *Substantial Evidence Supports the Jurisdictional Findings under Section 300(b)(1)*[4]

To establish jurisdiction under section 300, subdivision (b)(1), the Agency must show: "(1) neglectful conduct, failure, or inability by the parent; (2) causation; and (3) serious physical harm or illness or a substantial risk of serious physical harm or illness." (*In re L.W.* (2019) 32 Cal.App.5th 840, 848.) The third element requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future. (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111.) Standing alone, past conduct is insufficient to establish a substantial risk of harm and "there must be some reason beyond mere speculation to believe [the past conduct] will reoccur." (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564-565.)

The court, however, " 'need not wait until a child is seriously abused or injured to assume jurisdiction' " and "[a] parent's past conduct is a good predictor of future behavior." (*In re. T.V.* (2013) 217 Cal.App.4th 126, 133.) " 'Facts supporting allegations that a child is one described by section 300 are cumulative.' [Citation.] Thus, the court 'must consider all the circumstances affecting the child, wherever they occur.' " (*Ibid.*) On appeal, the parent has the burden of showing that there is insufficient evidence to support the juvenile court's jurisdictional findings. (*Ibid.*)

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4 Mother tenders a lengthy argument stating that if she is found to be an offending parent, that we have discretionary authority to review jurisdictional findings and orders against one parent. The Agency responds, and we agree, that because the court struck J.H.V. from the petition, Mother is the only legal parent in these proceedings with standing to challenge the juvenile court's orders.

Mother contends that substantial evidence does not support the juvenile court's jurisdictional finding under section 300, subdivision (b)(1) because the record does not show a current risk of harm to J.H. due to her prenatal methamphetamine use. She denies a lengthy drug use history and argues that she stopped using drugs after she learned of the pregnancy, claiming that the Agency simply speculates that she used drugs shortly before her delivery. To support this claim, she cites a study that methamphetamine can be transferred through the skin from household surfaces.

"The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.) Accordingly, with respect to a child of "tender years," such as J.H., a finding of substance abuse is prima facie evidence of the inability of a parent to provide regular care, resulting in a substantial risk of physical harm. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1220.) This relationship between substance abuse and resulting substantial risk of physical harm rests on the reasonable proposition that children young enough to need constant supervision face an " 'inherent' " and substantial risk of serious physical harm if their caregiving parent is engaged in activity that renders the parent less capable of providing the requisite supervision. (*Id.* at p. 1216.)

We reject Mother's assertion that the evidence does not support the court's finding that she suffered from a "long history" of methamphetamine abuse. Mother focuses on her age, claiming that she used methamphetamine for less than six years and spent about 26 years sober. This argument ignores the evidence showing Mother's tendency to relapse into drug use despite long periods of nonuse.

Mother admitted that her family "always asked her to stop" her drug use. Based on Mother's self-reports, she used methamphetamine for three years as a teenager, stopped for 12 years during her marriage, but immediately returned to the drug when her marriage ended. After her 2016 arrest for attempting to smuggle drugs, Mother claims that she did not use during her 32-month incarceration. After her release from prison, however, she immediately relapsed into weekly methamphetamine use and continued using during the first five to seven months of her pregnancy—claiming ignorance of her condition.

The social worker appropriately expressed concern that Mother minimized her addiction, considered her past drug use insignificant, and would continue to use methamphetamine as a coping mechanism for the stressors in her life, especially when caring for a newborn. Even assuming the veracity of Mother's self-proclaimed periods of sobriety, Mother's behavior of returning to methamphetamine use after long periods of sobriety suggests a strong addiction. We agree with the juvenile court that the record shows a long history of methamphetamine abuse.

Mother argues that the juvenile court improperly took jurisdiction over J.H. because the evidence shows that she completely stopped her drug use after she learned about the pregnancy and there is no evidence that she returned to drugs after that. The record, however, placed Mother's credibility at issue.

Mother initially stated that she received prenatal checkups in Tijuana, but she could not remember the name of the clinic. The following month, Mother reported that she did not receive prenatal care, but had visited a "Similar" clinic for an ultrasound and to receive folic acid. The social worker, however, was unable to locate a clinic in Tijuana named "Similar."

Additionally, Mother claimed that she attempted to smuggle only crystal methamphetamine across the border. When the social worker confronted Mother with the facts of her federal crime, Mother downplayed the conviction stating it was an "isolated incident." Mother was found with almost 12 kilograms (about 26 pounds) of drugs. Whether isolated or not, this is a significant quantity and cause for reasonable concern about Mother's involvement not only as a drug user, but also in drug transportation and sales.

At J.H.'s birth, both his and Mother's urine tested positive for amphetamine, a metabolite of methamphetamine. We found nothing in the record indicating when methamphetamine must be ingested to result in a positive urine test. An umbilical cord test confirmed that J.H. had amphetamine and methamphetamines in his system at birth, which reflected maternal drug use during the last trimester of a full-term pregnancy. Thus, if Mother stopped her drug use after her fifth or sixth month of pregnancy, she should have tested negative for drugs. However, given the changing dates Mother allegedly discovered her pregnancy, it is unclear when Mother last used methamphetamine. This uncertainty is furthered by Mother's admission that she stayed with friends who used methamphetamine days before giving birth. Even assuming Mother did not partake, her decision to again expose herself and her unborn child to methamphetamine shows extremely poor judgment endangering J.H.'s health.

We acknowledge that Mother attended a substance abuse program three days weekly for three hours each day. Mother has also tested negative on all drug tests since she started the program in December 2019. Courts have recognized, however, that parents who suffer chronic substance abuse over many years must show more than several months of sobriety to

demonstrate that they have truly overcome the addiction. (See, e.g., *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423.) The juvenile court aptly commented that Mother's sobriety would be a "lifetime project." The judge reasonably observed that Mother's efforts were too recent to suggest with any degree of confidence that she would be able to maintain her sobriety without court intervention. We similarly conclude that Mother has not overcome the child of tender years presumption in this case. Accordingly, the juvenile court appropriately assumed jurisdiction over J.H.

3. *The Portion of the Dispositional Order Removing J.H. From Mother's Custody Must Be Reversed*

"At the disposition hearing, the court must decide where the minor will live. The options 'may range from supervised custody (§ 362) to removal of the child from the home. (§ 361.) The court's principal concern is a disposition consistent with the best interests of the minor.' " (*In re Tasman B.* (1989) 210 Cal.App.3d 927, 931.) "In determining whether a child may be safely maintained in the parent's physical custody, the juvenile court may consider the parent's past conduct and current circumstances and the parent's response to the conditions that gave rise to juvenile court intervention." (*In re D.B.* (2018) 26 Cal.App.5th 320, 332.) The parent need not be dangerous, and the minor need not have been harmed before removal is appropriate. Rather, the focus of the statute is on averting harm to the child. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on another point in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.)

Before the juvenile court may order a child physically removed from his or her parent's custody, it must find, by clear and convincing evidence that: (1) a substantial danger exists to the well-being of the minor if the minor were returned home, and (2) there are no reasonable means to protect the minor's

physical health without removing the minor from the parent's physical custody. (§ 361, subd. (c)(1).) The jurisdictional findings are prima facie evidence on the first issue. (*Ibid.*) As to the second issue, the juvenile court must also determine "whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home" and "shall state the facts on which the decision to remove the minor is based." (*Id.*, subd. (e).) To aid the court in determining whether the efforts were adequate, the California Rules of Court require that the petitioner submit a social study which "must include" among other things, "[a] discussion of the reasonable efforts made to prevent or eliminate removal[.]" (Cal. Rules of Court, rule 5.690(a)(1)(B)(i).)

" '[O]ur dependency system is premised on the notion that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents' rights but also children's and society's best interests.' [Citation.] The requirement for a discussion by the child welfare agency of its reasonable efforts to prevent or eliminate removal (Cal. Rules of Court, rule 5.690(a)(1)(B)(i)) and a statement by the court of the facts supporting removal (§ 361, subd. ([e])), play important roles in this scheme. Without those safeguards there is a danger the agency's declarations that there were 'no reasonable means' other than removal 'by which the [children's] physical or emotional health may be protected' and that 'reasonable efforts were made to prevent or to eliminate the need for removal' can become merely a hollow formula designed to achieve the result the agency seeks." (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 810 (*Ashly F.*).) We examine the record to determine whether a reasonable trier of fact could have regarded the evidence

establishing the section 361 requirements as satisfying the clear and convincing standard of proof. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1009.)[5]

Mother contends that the juvenile court erred in removing J.H. from her custody without evidence of any current risk of danger.[6] She argues that the record demonstrates she can remain sober when motivated and that J.H. provides this motivation. Although she concedes that the juvenile court stated facts on which it based the removal order, Mother asserts that the facts stated are not true. She also contends that the record contains no evidence that reasonable efforts had been made to prevent or to eliminate the need to remove J.H., and that reasonable means existed to adequately protect J.H. without removal.

The record contains substantial evidence from which the juvenile court could have found it highly probable that a substantial danger to J.H.'s well-being existed if he were returned to Mother's custody. Mother relies on the

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5 As a preliminary matter, while acknowledging a split of authority, the Agency incorrectly argues that the clear and convincing standard " ' "disappears on appeal." ' " The California Supreme Court recently resolved this split of authority, clarifying that on appeal, we "must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before [us] is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. In conducting [our] review, [we] must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at pp. 1011-1012.)

6 Mother does not challenge the remainder of the juvenile court's dispositional order.

same arguments she made in the context of the juvenile court's jurisdictional findings. We find her arguments unpersuasive for the same reasons. As discussed *ante* in section 2, sufficient evidence supported the juvenile court's conclusion that Mother was not secure in her sobriety and that returning J.H. to her custody would place him at risk of harm.

With regard to the second requirement, Mother claims that the removal order was not necessary because reasonable alternatives existed and the juvenile court did not consider less drastic alternatives. We agree.

Section 361 contains two prongs. Even where, as here, the first prong is satisfied, a child cannot be removed unless no reasonable means exist to protect the minor's physical health without removing the minor from the minor's parent's physical custody. (§ 361, subd. (c)(1).) At the hearing, the juvenile court did not mention the existence of alternatives to out-of-home placement and there is no indication that the juvenile court considered less drastic measures before making the necessary statutory determination that "there are no reasonable means by which the minor's physical health can be protected" short of removal.[7] (§ 361, subd. (c)(1).) At a minimum, the juvenile court should have considered whether J.H. could be adequately protected by closely monitoring Mother and requiring her to randomly drug test, continue compliance with her substance abuse program and case plan, and reside with the maternal aunt.

When the juvenile court violates a statutory mandate, reversal is justified only when it is reasonably probable the court would have reached a result more favorable to the appellant in the absence of the error. (*In re Cristian I.* (2014)

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7 It is possible that the juvenile court overlooked addressing this element because the January 16, 2020, jurisdiction/disposition report does not include the mandated "discussion of the reasonable efforts made to prevent or eliminate removal, . . . and a recommended plan for reuniting the child with the family. . . ." (Cal. Rules of Court, rule 5.690(a)(1)(B)(i).)

224 Cal.App.4th 1088, 1098-1099.) Here we cannot conclude that the juvenile court's error in ignoring this statutory mandate was harmless because the record suggests that other means may well have ensured J.H.'s safety while still allowing Mother to retain physical custody. (See *Ashly F.*, *supra*, 225 Cal.App.4th at p. 810 [failure to comply with statutory mandate was prejudicial because "ample evidence existed of 'reasonable means' to protect [the children] in their home" given the mother's expression of remorse and enrollment in a parenting class]; see also *In re Henry V.* (2004) 119 Cal.App.4th 522, 529 [although the juvenile court checked a box reciting the findings required under § 361, subd. (c)(1), the court "did not mention the existence of alternatives to out-of-home placement" and there was "ample evidence that appropriate services could have been provided . . . in the family home"].)

Mother immediately expressed remorse for the positive toxicology results at J.H.'s birth. It is undisputed that since J.H.'s birth, Mother has been sober, that she attends J.H.'s doctors' appointments, attends all visits prepared with a diaper bag, and acts appropriately during visits. The social worker described Mother as being attentive to J.H. and as "demonstrat[ing] great parenting skills." J.H.'s caregivers even stated that they were "proud of" Mother. Additionally, Mother was taking classes in parenting, life skills, and relapse prevention and "doing very well." Mother's counselor reported that Mother was motivated to reunify with J.H. At a minimum, the Agency should have explained why some combination of specific requirements and active monitoring would not have allowed J.H. to remain safely with Mother.

Especially when viewed through the lens of a clear and convincing evidence standard (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at pp. 1011-1012), the record here contains virtually no evidence on the "reasonable efforts" question. Accordingly, we reverse the dispositional order and remand the

matter for a new disposition hearing at which the Agency can attempt to demonstrate what reasonable efforts have been made to prevent removal based on the facts existing at the time of the new disposition hearing. (See *Ashly F.*, *supra*, 225 Cal.App.4th at p. 811.) We express no opinion on how the juvenile court should rule upon remand.

DISPOSITION

The juvenile court's jurisdictional order is affirmed. The juvenile court's dispositional order is reversed, and the matter is remanded for a new disposition hearing in compliance with section 361.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

GUERRERO, J.